SUPREME COURT, U.S.
FILED

94 766 OCT 26 1994

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division-Second Judicial Department

PETITION FOR A WRIT OF CERTIORARI

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October 26, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

94-766

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of New York, Appellate Division, Second Judicial Department was required by this Court's mandate in *Duffy v. Wetzler,* 113 S. Ct. 3027 (1993) to reconsider all matters fairly within the questions presented to this Court in that petition.

2. Whether a claim for damages brought under 42 U.S.C. § 1983 in a state court may be defeated by the assertion of parochial state procedural and substantive defenses in which such defenses would not be available if the action had been brought in a federal forum.

3. Whether the Constitution requires that meaningful backward-looking relief be provided to taxpayers who are ensnared by a State's tactic of constantly changing the rules concerning the remedies putatively available for unconstitutional taxation.

PARTIES TO THE PROCEEDING

The parties to this action are Eugene H. and Alice G. Duffy, James Sweezy,* Fernando S. Maura on behalf of themselves and on behalf of all others similarly situated; ** and Respondents James W. Wetzler, individually and as New York State Commissioner of Taxation and Finance, Roderick G.W. Chu, individually, Edward V. Regan, individually and as Comptroller of the State of New York, Anthony Shorris, Stanley F. Grayson, Abraham Biderman and Paul Crotty, individually and as present or former Commissioners of Finance of the City of New York, and the City of New York.

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* Agnes Sweezy, wife of James Sweezy, who was a party to the proceedings below, died on July 31, 1992. James Sweezy is Agnes Sweezy's successor-in-interest.

** In the proceedings below, the petitioners' motion to certify this case as a class action on behalf of similarly situated civilian and military annuitants of the federal government was denied.

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PETITION FOR A WRIT OF CERTIORARI

Eugene H. Duffy, Alice G. Duffy, James Sweezy and Fernando S. Maura, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department").

OPINIONS BELOW

The Decisions and Orders of the Second Department dated August 8, 1994, sought to be reviewed are reported at 616 N.Y.S.2d 48 and 616 N.Y.S.2d 213 (1994). They are reprinted in the appendix hereto at App. A at 1a ("Duffy II").

Previously, the Second Department, in its decision reported at 579 N.Y.S.2d 684 (1992) and reprinted in the appendix hereto as App. B at 7a ("Duffy I"), affirmed in part and reversed in part the decision of the Supreme Court of the State of New York, Queens County (the Honorable Alan LeVine). The Supreme Court of the State of New York's decision is reported at 555 N.Y.S.2d 543 (1990), and is reprinted in the appendix hereto at App. C at 25a. Its order and judgment are reprinted in the appendix hereto at App. D at 39a.

Petitioners filed a petition for a writ of certiorari to the Second Department in *Duffy I*. The Court granted the petition, vacated the judgment in *Duffy I* and remanded the case to the Second Department for further consideration in light of *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993) ("*Harper*"). The mandate of the Court is reported at 113 S. Ct. 3027 (1993) and is reprinted in the appendix hereto at App. E at 45a.

In *Duffy II,* on remand, the Second Department dismissed, on the State's and City's consent, their appeals of Justice LeVine's decision and refused to reexamine the rest of its earlier decision in *Duffy I*. It is from this action that this petition for a writ of certiorari is addressed.

JURISDICTION

The opinion of the Second Department was entered on August 8, 1994. Petitioners sought review of that opinion. On August 15, 1994, petitioners filed a motion for leave to appeal to the New York State Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i) and 5514(a). The New York State Court of Appeals denied petitioners' motion by order dated September 1, 1994, which is reprinted in the appendix hereto at App. F at 46a. Jurisdiction to review the decision herein by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

42 U.S.C § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause and Equal Protection Clause of the United States Constitution, Amendment XIV, provide in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of the statutory schemes of the State and City of New York, as well as the provisions of the CPLR are set forth in App. G at 47a.

STATEMENT OF THE CASE

This is the second time that petitioners have sought a writ of certiorari to the Second Department in connection with a challenge to the denial of a clear and certain remedy for the recovery of taxes imposed on federal retirees in violation of 4 U.S.C. § 111 and remedies related thereto.

Despite the fact that *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), held that such taxes were illegal and unconstitutional, and that *Harper* held that *Davis* must be given retroactive effect, many, if not most, of the states that imposed such unconstitutional taxes have been engaged in a war of attrition designed to avoid or minimize the payment of refunds and related remedies to federal retirees. New York is one of those states.

In the aftermath of *Harper*, this Court granted the prior petition in this case, *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993), for a writ of certiorari to the Second Department. The petition was granted on the two questions presented therein; the decision in *Duffy I* was vacated and the case was remanded to that court for further consideration in light of *Harper*.

For exactly one year after the remand, the respondents continued to oppose the payment of any refunds or the granting of any other relief. Finally, recognizing that their predeprivation defenses, like those in *Reich*,[1] were without merit, the respondents abandoned them. On June 27, 1994, New York State unilaterally announced that it would provide limited relief only to those taxpayers whom it deemed had timely filed for refunds. This announcement

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[1] *See Reich v. Collins*, 114 S. Ct. 1048 (1994). The respondents have also challenged the availability of backward-looking relief as is at issue in the pending petition in the *Davis*-related case of *Swanson v. North Carolina*, 441 S.E.2d 537 (N.C. 1994), *petition for cert. filed*, 62 U.S.L.W. 3827 (U.S. May 25, 1994) (No. 93-1882). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *on remand*, 437 S.E.2d 782 (Ga. 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 13, 1994) (No. 93-1140).

came without any consultation or advance notice to counsel, without notice and opportunity to be heard having been afforded putative class members and without any approval by or supervision of the court. As described below, the fallout from that extra-judicial act has had extreme consequences, the result of which makes this case once again ripe for review.

This is now a long-pending case. On May 9, 1989, the petitioners, who are retired employees of the federal government, commenced this class action suit in New York state court on behalf of themselves and all others similarly situated challenging the constitutionality of New York State's and City's discriminatory schemes, seeking, *inter alia,* declaratory and injunctive relief under 42 U.S.C. § 1983 and state law to enjoin the continued enforcement of the State's and City's discriminatory schemes of taxation and seeking, *inter alia,* damages under 42 U.S.C. § 1983 and refunds under state law for the unconstitutionally collected taxes for the years 1986, 1987 and 1988.[2]

By Memorandum Decision dated April 10, 1990, the trial court granted petitioners a declaratory judgment holding that:

(1) The City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis*;

(2) The City and State defendants therefore may not assess and collect personal income taxes on fed-

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[2] In response to this action, the Legislature of the State of New York amended Tax Law § 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) by removing the unconstitutional provision that discriminated against federal retirees. This remedial legislation applies only to tax years 1989 and thereafter.

eral pension benefits received in years 1986 through 1988, which may be still due and owing;

(3) Plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the Tax Law.

See App. C at 28a-29a.[3]

The trial court also granted petitioners a permanent injunction and enjoined respondents from assessing and collecting income taxes on pension benefits which may be due and owing, and further enjoined respondents from "interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on federal pension benefits for the years 1986 through 1988. . . ." The trial court, however, denied petitioners' motion for class certification and granted respondents' summary judgment motion dismissing the first and fourth causes of action for damages under 42 U.S.C. § 1983 and for money had and received, respectively. The order and judgment was entered on June 26, 1990. However, the judgment in favor of the petitioners was automatically stayed pending appeal, thus permitting the continued enforcement of the unconstitutional scheme throughout these proceedings. R2. 424-426, 477, 551.

On appeal and cross appeal, the Second Department reversed the trial court's declarations and injunction. The Second Department concluded that this Court's decision in "*Beam* requires prospective application" of *Davis*. App. B at 9a. The Second Department also affirmed the trial

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[3] Petitioners, on behalf of themselves and all others similarly situated, have satisfied all procedural requirements imposed by the New York Tax Law. See, e.g., R. 514; R2. 639. ("R." refers to Part I of the record on appeal pages 1-536 and "R2." refers to Part II of the record on appeal pages 1-769.).

court's dismissal of the petitioners' claims for damages under 42 U.S.C. § 1983 and its denial of petitioners' motions for, *inter alia,* class certification and for a common fund attorneys' fee award.

Petitioners sought review of the Second Department's decision in *Duffy I* from the New York State Court of Appeals, which review was denied. App. H at 52a; App. I at 54a. Petitioners then sought a writ of certiorari to review the judgment of the Second Department. On June 28, 1993, this Court granted the writ of certiorari, vacated the decision of the Second Department in *Duffy I* and remanded the case for further consideration in light of *Harper.*

While the issues on remand relating to remedies for the federal claims and rights at issue in this case were pending before the Second Department, the State announced that it would pay certain refunds. Because of the effect such a payment would have on the rights and remedies at issue, petitioners sought emergency relief from the Second Department. On July 19, 1994, petitioners were granted a temporary restraining order which, *inter alia,* prevented the State from conditioning acceptance of the refunds in any way and from distributing any more than 80% of the refunds and interest. Argument on a motion for a preliminary injunction was set for September 14, 1994. App. J at 56a.

On August 8, 1994, prior to the scheduled oral argument, and without any prior notice to petitioners, the Second Department issued two Decisions and Orders. The first order determined the appeal on remand by finding that the issue of remedy and potential refunds was "academic" in light of the State's announced intention to provide limited relief to those members of the class that the State now deemed had timely filed for refunds. Specifically relying on its prior decision which was vacated by this Court, the Second Department refused to reexamine the remaining issues. The second order vacated the tempor-

ary restraining order that had been in effect. Together, these two orders are referred to as "*Duffy II*."

The two sentence ruling on the appeal in *Duffy II* was as follows:

> Accordingly, the issues affected by the remittitur by the United States Supreme Court for further consideration in light of *Harper, i.e.*, those relating to the remedy and the potential refunds, are academic. Moreover, the plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorney's fees, were previously rejected by this Court in *Duffy I*, and need not be reexamined. App. A at 4a.

The decision in *Duffy II* was both in contravention of this Court's mandate and wrong as a matter of law. Accordingly, on August 15, 1994, petitioners filed two motions with the New York State Court of Appeals. One application sought an injunction or a stay of the enforcement of the *Duffy II* orders and the second sought leave to appeal to the New York State Court of Appeals. After a hearing in chambers, Judge Bellacosa of the Court of Appeals granted a temporary stay pending the decision on the motions. (App. K at 58a-59a).

On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and, therefore, vacated the previously entered stay. (App. F at 46a). Also on September 1, 1994, petitioners filed an application with this Court for a stay pending the petition in this case. That application was denied that day by Justice Thomas. (App. L at 60a). The application was renewed to Justice Souter on September 2, 1994, who then referred it to the full Court. That application was denied on September 14, 1994. (App. M at 61a).

REASONS FOR GRANTING THE WRIT

This case is before this Court for a second time as the result of the changing positions of the respondents concerning, *inter alia,* what remedies, if any, are available to petitioners and the putative class in New York. It is but the latest in a long line of cases coming to this Court challenging various states' refusals to provide a clear and certain remedy for the recovery of taxes imposed upon federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis,* this Court has seen 23 petitions from 15 states relating thereto.[4] This Court has granted plenary review in three post-*Davis* cases, and it has yet to follow a state to deny relief for taxes unconstitutionally imposed on federal retirees.[5] Yet, absent review in this case, it is likely that this Court will see several more *Davis*-related

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[4] Arkansas—*Pledger v. Bosnick,* 811 S.W.2d 286 (Ark. 1991), *cert. denied,* 113 S. Ct. 3034, *reh'g denied,* 114 S. Ct. 25 (1993); Arizona—*Estate of Bohn v. Waddell,* 113 S. Ct. 3000, *reh'g denied,* 114 S. Ct. 15 (1993); Colorado—*Colorado v. Kuhn,* 112 S. Ct. 1925 (1992); Georgia—*Reich v. Collins,* 113 S. Ct. 3028 (1993), *cert. denied,* 114 S. Ct. 875 (1994) and *cert. granted in part,* 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa,* 112 S. Ct. 84 (1991); Kansas—*Barker v. Kansas,* 112 S. Ct. 1619 (1992); Massachusetts—*Filios v. Commissioner of Revenue,* U.S. No. 93-1145; Missouri—*Missouri Director of Revenue v. Hackman,* 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana Dept. of Revenue,* 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler,* 113 S. Ct. 3027 (1993); Oregon—*Nutbrown v. Munn,* 112 S. Ct. 867 (1992); North Carolina—*Swanson v. Powers,* 112 S. Ct. 871 (1992) and *Swanson v. North Carolina,* 441 S.E.2d 537 (N.C. 1994), *petition for cert. filed,* 62 U.S.L.W. 3827 (U.S. May 25, 1994) (No. 93-1882); South Carolina—*Bass v. South Carolina,* 111 S. Ct. 2883 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Dep't of Taxation,* 501 U.S. 1247 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Dep't of Taxation,* 111 S. Ct. 2883 (1991) and 113 S. Ct. 3024 (1993); Wisconsin—*Hogan v. Musolf,* 112 S. Ct. 867 (1992).

[5] *Barker v. Kansas,* 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993); *Reich v. Collins,* 114 S. Ct. 1048 (1994).

petitions as the states assert further "games" like those tolerated below.[6]

The respondents' war of attrition against federal retirees in this case has been waged along lines identical to those advanced by the several states in other *Davis*-related litigation. *See, e.g.,* Brief Amici Curiae of NARFE, et al. in support of petitioners in *Reich v. Collins.* This has been characterized by ever changing positions as to the basis for denying federal retirees a clear and certain remedy for the respondents' violations of federal retirees' federal rights. These changing positions have included:

1. Taxes must be paid first, refunds will be available if *Davis* is retroactive. (May 25, 1989, June 13, 1989). (R. 199,200).

2. Federal retirees could, but need not, apply for refunds in order to be protected. *See* statement by respondents reported in Utica Observer-Dispatch, April 14, 1989.

3. No injunction may be sought because there is a refund right. (June 13, 1989). (R. 314,316).

4. "[There is] not . . . a single case in which New York State refused to refund monies collected pursuant to . . . the personal income tax provision of Article 22, later declared unconstitutional." (Representation by Attorney General of New York State to the United States Court of Appeals for the Third Circuit in *Hardwick v. Cuomo,* 891 F.2d 1097, 1105 (3d Cir. 1989)).

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[6] *See, e.g., Commonwealth of Kentucky Revenue Cabinet, et al. v. Gossum,* Nos. 92-SC-001041-TG, 94-SC-216 TX (Ky., Sept. 1, 1994), (holding that federal retirees are limited to two years of refunds while all other Kentucky taxpayers are entitled to four years); *Bohn v. Waddell, appeal pending,* No. 1 CA-TX, 94-009 (Ariz. Ct. App.) (nullifying this Court's holding in *Harper* by vitiating the final and undisturbed prior judgment in *Bohn,* 807 P.2d 1 (Ariz. Tax 1990), tolling the statute of limitations pending the resolution of the retroactivity of *Davis*).

5. Refunds will not be paid. (May 18, 1990). (R 2. 429).

6. Refunds will be paid if *Davis* is retroactive because New York has waived its common law right to retain unconstitutionally collected taxes. (State Defendants' Appellate Brief in *Duffy I*, October 25, 1990, p.32).

7. Even though *Davis* is retroactive, no refunds will be paid. (Letter from Department of Taxation and Finance to Eugene H. Duffy dated August 31, 1993, Add.3 to Answering Brief and Brief on Remand from United States Supreme Court for Plaintiffs-Respondents-Cross Appellants).

8. New York has not waived its common law right to retain unconstitutionally collected taxes because the refund right of federal retirees was "delimited" by the New York Legislature in 1989. (Brief for Defendants-Appellants Wetzler, Chu and Regan (September 21, 1993)).

9. There is no refund right because an injunction could have been sought. *Id.*

10. Despite this Court's holding in *Harper*, "*Davis v.* Michigan should not be retroactively applied." (Amended Answer of City Defendants dated July 26, 1993 in *Alderman v. Wetzler*).

Thus, this case presents a variation of the states' "heads I win, tails you lose" remedies games in *Davis*-related litigation. Here, with the day of reckoning at hand, with the complicity of the Second Department, the respondents frustrated the mandate of this Court in *Duffy I* by an extra-judicial act in an effort to "buy off" the case, thereby purporting to foreclose without notice and opportunity to be heard the rights of over 20,000 New York federal retirees to the "clear and certain" remedy to which they were entitled.

For the reasons set forth below, petitioners respectfully urge that the Court grant this petition.

I. THE DECISION BELOW FLOUTS THE MANDATE OF THE COURT IN DUFFY I.

This case presents an issue of profound significance which implicates federal constitutional and statutory concerns and is of overwhelming public importance. The issue presented is whether state courts can ignore with impunity the mandates of this Court. This goes to the very heart of our system of federalism.

In *Duffy I*, this Court vacated the decision of the Second Department and ordered its reconsideration in light of *Harper*.[7] Instead, on remand, by its Decision and Order of August 8, 1994, the Second Department refused to reconsider most, if not all, of the issues presented on remand.[8] Indeed, with respect to the very issues presented, the Second Department determined they "need not be reexamined." That decision is completely at odds with the mandate of this Court.

The result is that, absent further intervention of this Court, in New York there will be no "meaningful opportunity" for "relief" sufficient to "satisfy the Due Process

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[7] The questions presented to this Court in *Duffy I* were:

1. Whether 4 U.S.C. § 111 and this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.
2. Whether an action brought under 42 U.S.C. § 1983 in a state court may be defeated by the assertion of state procedural and substantive defenses, where such defenses would not be available if the action had been brought in a federal forum.

[8] Although it is by no means clear, the Second Department apparently concluded that the only issues potentially affected by *Harper* related to "the remedy and the potential refunds" on plaintiffs' claim for injunctive relief (third cause of action). Even these issues, however, it failed to reconsider as it considered them to be "academic."

Clause of the Fourteenth Amendment" for individual taxpayers to challenge future illegal and unconstitutional taxation, as required by *Harper* and *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), *on remand*, 574 So. 2d 114 (Fla. 1991). The New York federal retirees in this case, and other New York taxpayers generally, will be most effectively prevented from challenging taxes imposed by New York State or any other taxing authority therein if the decision of the Second Department in *Duffy II* is permitted to remain law. In view of the expense attendant to prosecuting these actions for relatively small claims, federal constitutional and statutory rights will be eliminated in New York for all but the wealthy. The Due Process Clause and Equal Protection Clause of the United States Constitution, Amendment XIV and 42 U.S.C. § 1983 will each be rewritten in New York to protect only "wealthy" persons rather than all persons.

Had the Second Department followed the mandate and reconsidered *Duffy I* in light of *Harper*, a different result would necessarily have been obtained in *Duffy II*. As set forth more fully below, the Second Department's decisions with regard to class action status, the claims under § 1983 and a common fund attorneys' fee award are erroneous in both *Duffy I* and *Duffy II*. In *Duffy I*, however, in part these rulings flowed directly from the Second Department's incorrect holding that *Davis* would not be given retroactive effect and no refunds and similar relief should be awarded. In light of *Harper*, the fundamental premise of the Second Department's rulings in *Duffy I* and, therefore, *Duffy II*, has been eliminated.

In similar circumstances this Court has not countenanced the refusal to abide by or an effort to avoid its mandate. Thus, in *Henry v. City of Rock Hill*, 376 U.S. 776 (1964), the state court's ruling that the case, in light of which this Court directed it to reconsider its decision, was "distinguishable" was rejected. This Court

then held that such authority was controlling and reversed the holding of the state court. *A fortiori,* here the holding of the Second Department should also be rejected as it did not even consider whether *Harper* was "distinguishable" and instead simply refused to reexamine its ruling. *Cf. Deen v. Hickman,* 358 U.S. 57 (1958); *Bucolo v. Adkins,* 424 U.S. 641 (1976) (Supreme Court has power to grant writ of mandamus to compel state court to conform its decision in prior ruling of this Court in a matter on remand.).[9]

The importance of the question presented cannot be exaggerated. State courts simply may not be permitted to ignore, avoid, or otherwise fail to give full and complete effect to the orders of this Court. Absent the granting of this petition, the Second Department will have succeeded in undermining our entire system of justice.

II. THE SECOND DEPARTMENT WAS NOT FREE TO EXTINGUISH PETITIONERS' § 1983 DAMAGES CLAIM AS PART OF THE GAME OF REMEDY ROULETTE.

The decision of the Second Department has far-reaching consequences upon citizens' ability to vindicate federal rights in state courts. Like many of the *Davis*-related cases, it is premised upon the continuing belief of state courts that they are free to flout the mandates of this Court because they refuse to recognize *Davis* as the controlling statement of federal law.[10] Whatever latitude the state courts may have in deciding state law questions, however, no such latitude exists with respect to federal causes of action brought in state courts. *Howlett v. Rose,* 496

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[9] In contrast, in *Cambridge State Bank v. James,* 514 N.W.2d 565, *reh'g denied* (Minn. 1994), *cert. pending,* No. 94-331, on remand from this Court for further consideration in light of *Harper,* the Minnesota Supreme Court properly reexamined its prior decision in its entirety.

[10] *See, e.g., Reich v. Collins,* 114 S. Ct. 1048; *Swanson v. North Carolina,* 441 S.E.2d 537.

U.S. 356, *on remand* 571 So. 2d 29 (Fla. 1990); *Martinez v. California*, 444 U.S. 277, *reh'g denied* 445 U.S. 920 (1980). Here, as part and parcel of the game of remedy roulette, the elements of the federal cause of action were rewritten to permit the respondents to escape liability for injuries compensable under 42 U.S.C § 1983. The result below conflicts with the decisions of the Court and the Arkansas Supreme Court. *See Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *cert. denied*, 113 S. Ct. 3034, reh'g denied, 114 S. Ct. 25 (1993).

In view of this Court's mandate, the Second Department's decision on remand stands as a direct challenge to the supremacy of this Court and the integrity of our hierarchical court system. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of this Court and render the enforcement of federal rights inutile by denying citizens the federal remedy created by Congress under 42 U.S.C. § 1983. Thus, this case presents an ideal companion vehicle to *Reich* for the Court to make unmistakably clear that state courts have the unqualified obligation to recognize the pronouncements of this Court as the "controlling interpretation of federal law." *Harper*, 113 S. Ct. at 2517 (1993).

The refusal of the Second Department to "reexamine" the § 1983 question upon remand from this Court is directly contrary to the express holding of *Harper*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. In light of *Harper*, the Second Department was obligated to recognize, *inter alia*, this Court's decisions in *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992)

and *Hafer v. Melo*, 502 U.S. 21 (1991) as the "controlling statement[s] of federal law," *Harper*, 113 S. Ct. at 2515, in determining upon remand the federal remedy under § 1983 available to petitioners in this case.[11]

The decision below bars the petitioners from asserting their federal rights by engrafting additional elements onto the § 1983 cause of action. Contrary to the actions of the court in the decision below, Congress has not assigned to state courts "a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). The Court has repeatedly held the "elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375, *on remand*, 571 So. 2d 29 (Fla. 1990). *See Also Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992).

Even in the absence of the state remedy games played here, it was erroneous for the courts below to have dismissed the § 1983 damages claim without a trial. Contrary to the decision below, the Court's "cases do not support the [lower court's] reading of § 1983 as requiring an abuse of governmental power separate and apart from the proof of a constitutional violation." *Id.* at 1061, 1065. Similarly, contrary to the pre-*Hafer* holding of the trial court affirmed by the Second Department, the respondents may be held individually liable under § 1983 for acts performed in the course of their official duties. *See Hafer v. Melo*, 502 U.S. 21 (1991).

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[11] Moreover, the result reached by the Second Department upon remand in *Duffy II* is particularly egregious because it violates the important policy interests reaffirmed by the Court just last term in *Elder v. Holloway*, 114 S. Ct. 1019 (1994) that an appellate court must consider all relevant precedents, including those "not presented to or considered by the court of first instance", *id.* at 1021. *A fortiori*, an appellate court must consider controlling, intervening precedent of this Court affirming precedent cited in the first instance to both the trial court and the appellate court.

To the extent that the Second Department's dictum in *Duffy I* may be read to hold that the petitioners' § 1983 claims were alternatively subject to the affirmative defense of qualified immunity, its observation was erroneous. Even without *Harper*, it was indisputable that the City of New York was liable for damages under § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 638, *reh'g denied*, 446 U.S. 993 (1980) ("But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify . . . qualified immunity . . . ."); *American Trucking Associates, Inc. v. Smith*, 496 U.S. 167, 185 (1990) ("In *Owen*, we discerned that according municipalities a special immunity from liability for violations of constitutional rights would not best serve the goals of § 1983 . . . ."). Accordingly, the Second Department's decision "to redefine the federal cause of action," was in direct contravention of its obligation under the Supremacy Clause. *Howlett*, 496 U.S. at 383. Moreover, by failing to "reexamine" the § 1983 damage claim, the Second Department ignored the City's concession on remand that it is not entitled to assert the defense of qualified immunity. (Reply Brief of the City on Remand, November 24, 1993, p. 7).

Similarly, the defense of qualified immunity was *unavailable* to the individually named defendants. The respondent officials in this case failed to carry their "burden of showing that the conduct for which [they sought] immunity would have been privileged at common law in 1871." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring) (citations omitted). "Thus, if application of the principle is unclear, the defendant simply loses." *Id.* The Second Department was powerless to create an immunity in contravention of this Court's decisions.[12] At common law in 1871, tax officials

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[12] This issue is one of continuing difficulty for state courts. *See, e.g., Kerr v. Waddell*, 1994 WL 495516 (Ariz. App. 1994) (incorrectly holding that state tax officials enjoy qualified im-

did not enjoy immunity. *See, e.g.*, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 684 (1947).[13] Contrary to the result below, the Second Department did "not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[d] to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-93 (1984). "When, as here, . . . there is no historical tradition of immunity on which we can draw, [the] inquiry is at an end." *Buckley*, 113 S. Ct. at 2618.

As part of the respondents' game of remedy roulette—"heads, I win tails, you lose"—the respondents invoked the state's "governmental operations rule" to defeat class certification.[14] As a consequence, thousands of elderly citizens have been denied the federal damages remedy under § 1983 in this case by a state rule designed to thwart the enforcement of federal rights.[15] To the extent that respondents are correct that some 20,000 federal

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munity even in the absence of any showing of immunity at common law in 1871 and with respect to *post-Davis* enforcement schemes which violate the express terms of 4 U.S.C. § 111). In contrast, federal courts, in the limited cases where they are permitted to entertain state tax cases, appear to have little difficulty in correctly applying the law. *See, e.g., Self-Insurance Institute of America, Inc. v. Korioth*, 1994 WL 466188 (5th Cir. 1994) (holding individual defendants personally liable for sums illegally exacted).

[13] *See also Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *Erskine v. Van Arsdale*, 82 U.S. 75 (1872); *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912).

[14] That rule is that class action certification is inappropriate in a case where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of *stare decisis*. *Crociata v. State Tax Commission*, 508 N.Y.S.2d 842 (Sup. Ct. 1986), *aff'd*, 535 N.Y.S.2d 592 (App. Div. 1988).

[15] The prerequisites of Fed. R. Civ. P. 23, which are nearly identical to those found in C.P.L.R. 901(a)(1)-(4), all have been satisfied here. App. G at 49a. Defendants claimed that C.P.L.R. 901(a)(5) was not, however, satisfied.

retirees in New York may be denied the state remedy because they have not filed for a refund, nevertheless, state considerations cannot foreclose the § 1983 damages claim here. There is no requirement to seek the state remedy in order to prevail on the § 1983 claim. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The decision below approving a state defense to foreclose a § 1983 class claim is "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." *Felder v. Casey*, 487 U.S. 131, 153 (1988). It is contrary to the principles upon which the Court relied in preempting an analogous state notice of claim rule in *Felder* and has conditioned the right to bring a § 1983 class suit "against the very persons and entities Congress intended to subject to liability." *Id. See also Arnold v. Duchesne County*, 26 F.3d 982 (10th Cir. 1994), *cert. filed*, No. 93-358 (Aug. 25, 1994) (invalidating special state limitations statute for § 1983).[16]

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers like petitioners are remitted primarily to state courts to press their claims for § 1983 remedies. But it is state courts that have demonstrated the greatest difficulty in applying the mandates of federal law. Thus, this Court should grant review to protect the principle that state courts can not defeat the federal remedy by resorting to parochial considerations in conflict with the rights established by Congress.

III. PETITIONERS HAVE BEEN DENIED THE MEANINGFUL, BACKWARD-LOOKING RELIEF REQUIRED BY THE CONSTITUTION.

As in *Reich*, *Swanson* and *Beam*, here the machinations of the state and the rulings by its courts resulted in violations of the requirement that a clear and certain

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[16] *See also Garrett v. Bamford*, 538 F.2d 63, 72 (3d Cir. 1976) *cert. denied*, 429 U.S. 977 (1976) ("[A] state [cannot] depend upon burdensome piecemeal review procedures as an effective defense to an allegedly unconstitutional tax structure.").

remedy be provided for infringements of federal rights. *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993), *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *on remand,* 574 So. 2d 114 (Fla. 1991). The Second Department abdicated its responsibility to examine, in the light of *Harper,* whether New York provides an adequate remedy. Instead, it simply endorsed without analysis the inadequate remedy offered by New York and characterized all other issues as "academic" or otherwise not necessary to "reexamine." Accordingly, what is now, according to the Second Department, the sole remedy available in New York, fails to satisfy the requirements of due process.

The net effect of the Second Department ruling is that, in this case and all future cases which challenge the exaction of taxes on federal, constitutional or statutory grounds, unlike in other actions in New York, meritorious claims may be extinguished by the game of remedy roulette and class actions and common fund attorneys' fees will not be permitted. By preventing class certification, the State also prevents notice to members of the class whose federal rights were violated of their rights to seek a refund or other relief. In the absence of that notice, as is the case here, the vast majority of those whose federal rights were violated will not even be aware of the right to seek a remedy and will not, therefore, receive one. In addition, without class actions, each of the many thousands of taxpayers, if they are aware of their rights and if they can afford the expense, will have to bring an individual plenary action in order to vindicate their respective rights.[17] Efforts by the State here to mis-

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[17] *See also Garrett v. Bamford,* 538 F.2d 63 (3d Cir. 1976), *cert. denied,* 429 U.S. 977 (1976) (requiring multiple suits involving identical issues against same defendants constitutes an inadequate remedy); *Weeks v. Bareco Oil Co.,* 125 F.2d 84, 90 (7th Cir. 1941) ("To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to

lead taxpayers as to their rights to a refund or other relief, such as those described above, will be effectively countenanced by the courts and, as a result, the statute of limitation may run on individual claims.

The unavailability of a common fund or class action award of attorneys' fees and costs will also impose a dramatic limitation on the availability of any relief. Thus, future class representatives will have a strong disincentive to commencing suit as they will have no mechanism for dividing the costs and expenses of prosecuting such actions. Attorneys will be chilled from representing such clients as, for all practical purposes, few can afford to pay them to proseute individual claims. Only the wealthy will be able to vindicate their federal rights in New York and receive the remedies to which they are entitled by law. Other New Yorkers will have federal rights but no effective remedy.

The conclusion of the Second Department that the issues of class action certification and a common fund attorneys' fee award are not part of the issues concerning the remedy to be ordered conflicts with holdings of this Court, the courts in New York and with common sense. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980) (class actions and common fund attorneys' fees

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closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.").

[18] The decision of the Second Department regarding class certification also conflicts with the vast majority of other courts in states with *Davis* related liitgation, all of which are final. *See, e.g., Barker v. Kansas*, 112 S. Ct. 1619 (1992) (Kansas); *Kuhn v. State Dep't of Revenue*, 817 P.2d 101 (Colo. 1991), *cert. dismissed*, 112 S. Ct. 1925 (1992); *Burns v. State of N.M.*, No. SF 89-1314(c) (Santa Fe County, N.M.); *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted, Ex parte Sizemore*, 611 So. 2d 1069 (Ala. 1993). *Bryde v. State of Mich. Dep't of Treasury*, No. 89-12513-CM (Mich. Ct. Cl. 1992); *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *cert. denied*, 113 S. Ct. 3034, *reh'g denied*, 114 S. Ct. 25 (1993); *Brum-*

necessary to provide effective remedy for the breach of certain federal rights).[18] The failure to consider these aspects of the remedy for the constitutional violations in this case, and the indication that such aspects of remedy need not be considered in future cases, conflicts with the due process requirement imposed upon states by the United States Constitution, Amendment XIV and the consistent rulings of this Court. *See, e.g., McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *on remand,* 574 So. 2d 114 (Fla. 1991)

The ruling of the Second Department also directly conflicts wtih this Court's holding in *Deposit Guaranty.* The voluntary payment by the State to named plaintiffs in their individual capacities over their objections would not render the appeal of the denial of class action certification "academic." The Court held:

> A . . . court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.

Deposit Guaranty, 445 U.S. at 339. The "individual" interests of named plaintiffs in the litigation, which includes seeking an allocation of costs to those who benefit from a recovery, is sufficient to permit an appeal of the adverse certification ruling. *Id.* at 340.

By imposing the parochial defense of the governmental operations rule to prevent class action certification, New York extinguished a federal right.[19] *See Felder v. Casey,*

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ley v. Utah State Tax Comm'n, 868 P.2d 796 (Utah 1994); *Bass v. South Carolina,* 414 S.E.2d 110 (S.C. 1992), *vacated and remanded,* 113 S. Ct. 3025 (1993); *Ponthier v. Tarver,* No. 23396 order (La. Bd. Tax. App. May 4, 1992).

[19] The Second Department ruling also conflicts with New York law regarding the imposition of these defenses. *See Bryant Avenue*

487 U.S. 131, 147 (1988). Thus, the due process rights of plaintiffs to share the financial burden in prosecuting this claim pursuant to the class action statute have been eliminated. The discretionary state rule applied to insulate the State and its officials from liability may not take precedence over a federal right. *See also Howlett v. Rose,* 496 U.S. 356 (1990). "The Supremacy Clause makes those laws 'the supreme Law of the Land'. . .". *Id.* at 367. Similarly, the due process rights of plaintiffs were violated by the extinguishment of the common fund attorneys' fee remedy. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930). The court failed to consider this alternative method of sharing plaintiff's financial burden, a settled remedy available under New York law.

Finally, policy reasons also warrant the granting of this petition for a writ of certiorari. Absent a review by this Court, petitioners and the other retainer clients of petitioners' counsel will be forced to bear the entire costs associated with this litigation. Petitioners' counsel will not receive any common fund or class action attorneys' fee. Most of the federal retirees in New York who were unconstitutionally taxed in this instance, estimated to be approximately 20,000 of the 30,000 who were so taxed, will receive no recovery either in the way of a tax refund, damage award pursuant to 42 U.S.C. § 1983 or otherwise. Future challenges to unconstitutional exactions in New York State will be effectively precluded except for the wealthy. Average individual taxpayers will not be able to afford to bring such challenges. Attorneys will not be able to afford to represent taxpayers in such challenges. *See e.g.,* Podgers, *Chasing the Ideal,* 80 A.B.A.J. 56 (1994). New York State, its officials and indeed

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***Tenants' Assoc. v. Koch,* 522 N.E.2d 1041 (N.Y. 1988) (presence of governmental defendants in an action does not preclude class certification). *See also City of Rochester v. Chiarella,* 479 N.E.2d 810 (N.Y. 1985), *Dudley v. Kerwick,* 444 N.Y.S.2d 965 (App. Div. 1981) (class actions permitted in New York in actions involving the recovery of taxes.).**

officials from all states will effectively have impunity for violations of the federal rights of the average citizen. This Court should grant this petition to address this important issue of demonstrated difficulty for the states.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, should be granted.

Respectfully submitted,

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Dated: October 26, 1994

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